THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

May 15, 2019

Via email: CIMM@parl.gc.ca

Nicholas Whalen, M.P.
Chair, Standing Committee on Citizenship and Immigration
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Whalen:

Re: Bill C-97, Part 4 Division 16 –Changes to Canada's Refugee Determination System

I write on behalf of the Immigration Law Section of the Canadian Bar Association (the CBA Section) to express concerns about the proposed changes to Canada's refugee determination system in Bill C-97, the budget implementation bill,[1] and urge the government to withdraw the amendments to the refugee determination system proposed in Bill C-97. The proposed amendments would have a detrimental impact on refugee claimants who have previously filed a claim for refugee status in a country that Canada has an information-sharing agreement with (the relevant countries). The relevant countries are currently the US, the UK, Australia and New Zealand.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Section has approximately 1,000 members practicing in all areas of immigration law. Our members deliver professional advice and representation on the Canadian immigration system to clients in Canada and abroad.

Misuse of Omnibus Legislation

The CBA continues to express serious concern with the Government's use of omnibus bills. The introduction of major changes to Canada's refugee determination system through an omnibus budget bill hinders opportunities for public or parliamentary scrutiny and decreases effective democratic process and debate. Legislation that will severely restrict the ability of vulnerable refugee claimants to have their cases heard and thoroughly adjudicated deserves careful deliberation and expert review.

[1] Bill C- 97 Part 4 Division 16.

We urge the Government of Canada to limit the use of omnibus legislation and to refrain from using budget implementation bills to enact substantive legislation not directly related to finance, taxation or spending.

Proposed Changes are Unnecessary and Overbroad

The amendments in Bill C-97 render any individual ineligible to make a claim in Canada if they have previously made a claim in a relevant country.

In our view, the proposed amendments are unnecessary. Subsections 101 b) c) and d) of the *Immigration and Refugee Protection Act* (IRPA) already prohibit claimants found to be refugees in other countries from filing a second refugee claim in Canada.

The proposed changes are overbroad and could lead to unintended consequences. Individuals would be ineligible to make refugee claims in Canada without regard to the outcome of their previous claim in a relevant country. The proposed amendments would, for example, bar those whose claims in a relevant country were never decided as well as those whose claims were decided without a hearing.

Proposed Amendments Make Erroneous Presumptions

The proposed amendments rely on the erroneous presumption that all refugee claimants who filed a claim in a relevant country received a fair hearing. Refugee status determination processes in some of the relevant countries fall short of those in Canada. For example, most refugee claimants in the US are not represented by counsel. In Canada, the Refuge Appeal Division and Federal Court regularly overturn decisions where claimants were inadequately represented.

The proposed amendments are also premised on the idea that the refugee determination systems in the relevant countries conform to the same principles as the Canadian system, and if a claimant's case in a relevant country was refused, he or she is not in need of protection. This erroneous presumption could result in devastating consequences, particularly for women and children fleeing domestic and gang violence. For over two decades, Canada has recognized the rights of women and children fleeing domestic violence and has protected women facing gender-based persecution. However, women fleeing domestic violence are generally not recognized as a persecuted group in the US. These amendments could undermine Canada's role as a world leader in gender equality and the rights of children as required by the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of the Child* (CRC).

In Canada, whether an individual has a fear of persecution is assessed in a forward-looking manner at the time a claim is made. An individual should not be ineligible to make a refugee claim in Canada because of a claim they made in a relevant country years ago, as new risks may have since emerged.

Individuals may decide to leave a country before a decision is made on their refugee claim for many reasons that have no bearing on the validity of their claim. For example, many jurisdictions—including some of the relevant countries—have draconian and punishing detention policies that separate families or place refugee claimants in despairing conditions. Others have processing times in excess of ten years. A refugee claimant who left family members behind in a dangerous situation may not be able to wait so long. The decision of individuals to abandon their refugee claims in another jurisdiction should not be taken as an indication they are not in need of protection.

Pre-Removal Risk Assessment is not a Substitute for a Hearing

Under the amendments introduced in Bill C-97, refugee claimants who are deemed ineligible will not have a hearing with the Immigration Refugee Board (IRB), but will have access only to a Pre-Removal Risk Assessment (PRRA). The CBA Section is of the view that a PRRA is not an appropriate substitute for a hearing before the IRB for the following reasons:

- PRRAs are conducted by an Immigration, Refugees and Citizenship Canada employee, not by independent decision makers.
- Most PRRAs involve solely a paper review.
- At most, the decision is based on a personal interview that does not meet the standards of a hearing.
- Applicants are given little time to prepare their claim and are not allowed to call witnesses or cross examine government officials.
- There is no appeal to the Refugee Appeal Division, and refusal results in removal.
- There is no automatic prohibition against deportation while a challenge is pending before the Federal Court. Instead, applicants will be required to request deferral of removal and a stay at the Federal Court, further straining court resources.
- There is no nomination of designated representatives, as only the IRB can appoint a designated representative. Without a designated representative, the entire process could be void and violate Canada's international obligations under the CRC and Convention on the Rights of Persons with Disabilities.
- The claimants will not benefit from the important Chairperson Guidelines or from the Rules of the Refugee Protection Division, which protect refugee claimants' rights to equity and natural justice and ensure that files from the same family are heard together.
- The changes could lead to the separation of families. For example, if one family member made a claim in the US, while others did not, their refugee claims will not be heard together.
- The amendments have the effect of creating different rights in the same family unit, which could result in contradictory decisions based on the same facts.

Replacing the right to a hearing before the IRB with a PRRA deprives refugee claimants of their right to a fair hearing as set out by the Supreme Court of Canada in *Singh v. Canada.*[2]

The processing time for PRRAs can be one to two years, so replacing an oral hearing before the IRB with a PRRA for claimants made ineligible under the proposed amendments will not necessarily result in quicker processing.

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2 *(Minister of Employment and Immigration),* [1985] 1 S.C.R. 177

Potential Expansion of Relevant Countries

While Canada currently has information-sharing agreements with only the US, UK, Australia and New Zealand, the government may enter into agreements with other countries in the future. The ineligibility bar would automatically apply to individuals who made refugee claims in any country with which Canada has an information-sharing agreement, without being subject to Parliament's review. As Bill C-97 does not contain any provisions for evaluating whether other countries have comparable refugee determination systems, or respect international human rights and the Refugee Convention, it could lead to serious erosions of the rights of refugee claimants.

Other Areas of Concern

Allowing the Governor in Council to punish citizens from countries delaying the issuance of travel documents could result in people being sent back to countries where they may face persecution.[3]

The amendments will unfairly deprive claimants who cannot be removed from Canada and cannot get a hearing before the Refugee Protection Division from obtaining a PRRA, which are available only to persons who are "removal ready" (persons from Afghanistan, the Democratic Republic of Congo, Iraq, the Gaza Strip, Syria, Mali, the Central African Republic, South Sudan, Libya, Yemen, Burundi, Venezuela, Haiti, Cuba, and North Korea).[4] This will result in individuals being left in limbo for years, and families being unnecessarily separated for lengthy periods, in breach of Canada's international obligations.

Bill C-97 would also extend the bar on applications for a PRRA and humanitarian and compassionate consideration for refugee claimants who apply to the Federal Court for judicial review to one year from the date when the Federal Court case is decided.[5] This change unfairly prejudices people who experience serious issues with the determination of their refugee claim. Given the need to obtain leave to proceed in Federal Court, only a small percentage of cases will be affected by the amendments. These are cases, however, with serious issues in the determination process. If new risks arise, these individuals have no recourse for obtaining an assessment of the new risks, particularly since the Federal Court cannot assess the new risks. The time limited PRRA bar implicitly accepts that after one year has passed with no risk assessment, circumstances can change to then necessitate a new risk assessment. This amendment appears to be arbitrary and not connected to the bar's purpose.

Given these serious concerns, the CBA Section urges the government to withdraw the amendments to the refugee determination system proposed in Bill C-97.

Yours truly,

(original letter signed by Nadia Sayed for Marina Sedai)

Marina Sedai
Chair, CBA Immigration Law Section

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3 Bill C- 97 Part 4 Division 16 at 304.

4 See: CBSA, Removal from Canada, online at https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html

5 Bill C- 97 Part 4 Division 16 at 303 and 308.